30357 SERVICE DATE - JUNE 20, 2001
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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41995

WISCONSIN CENTRAL LTD.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF THE BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD COMPANY AND CSX TRANSPORTATION, INC.

Decided: June 15, 2001

Pursuant to a referral from the United States District Court for the Northern District of Illinois,[1] Wisconsin Central Ltd. (WCL) filed a petition for a declaratory order and a subsequent request for a procedural schedule for the Board to resolve issues in its dispute with the Baltimore & Ohio Chicago Terminal Railroad Company (BOCT) and its parent, CSX Transportation, Inc. (CSXT) (collectively, CSXT parties), concerning the reasonableness of intermediate switching charges that BOCT and CSXT seek to collect from WCL and whether the CSXT parties unlawfully discriminated against WCL in applying intermediate switching charges and handling WCL interchange traffic. The CSXT parties replied. Upon consideration of the record, we deny WCL's request that we rule on the reasonableness and discrimination issues pertaining to the switching charges.

BACKGROUND

In 1987, WCL and BOCT entered into negotiations for WCL to receive intermediate switching services to facilitate interchange between WCL and CSXT in the Chicago terminal area. Although an interchange agreement that the parties had drafted was never signed, the agreement was nevertheless carried out by both parties, and its validity is not challenged. Movements were made under the agreement from October 11, 1987, through August 4, 1996, and, pursuant to its terms, the charge contained in BOCT's tariff filed with our predecessor, the Interstate Commerce Commission (ICC), was incorporated into the agreement as the fee to WCL for the switching services provided. Within a year after BOCT began providing service, however, WCL ceased making payments. Nonetheless, BOCT continued to provide the service called for under the agreement. Negotiations and mediation between BOCT and WCL to resolve the dispute were unsuccessful.

[1] The Baltimore & Ohio Chicago Terminal R.R. v. Wisconsin Central Ltd., No. 93 C 3519 (N.D. Ill. Jan. 29, 1997).

In June 1993, BOCT filed suit to collect from WCL millions of dollars of unpaid intermediate switching and car-hire reclaim charges based on the tariff referenced in the parties' interchange agreement. Even though it asserted that the dispute was governed by the agreement, WCL counterclaimed that the referenced tariff charges were unreasonably high and discriminatory. In response, BOCT invoked the agreement's arbitration provision. In March 1994, the district court ruled that the parties had a binding contract, ordered the parties to arbitrate the dispute, and dismissed without prejudice WCL's unreasonableness and unlawful discrimination counterclaims pending the outcome.

The arbitration panel determined that WCL's failure to pay BOCT for the switching services rendered breached the parties' agreement, and that WCL was liable to BOCT for damages and interest totaling approximately $20 million. The district court affirmed the award, reinstated WCL's counterclaims that the contract-referenced tariff charge was unreasonable and discriminatory, and referred those claims to the Board. Accordingly, WCL filed a petition for a declaratory order in April 1997.[2]

The CSXT parties point out that it has long been this agency's policy that parties to inter-carrier contracts cannot shield themselves from their contractual obligations, and they argue that WCL has presented no basis to depart from that principle here. Relying on Coal Trading Corp. v. Baltimore & O. R. Co., 6 I.C.C.2d 361, 364-65 (1990) (Coal Trading), WCL contends, however, that we can and should resolve unreasonableness and discrimination issues when a court finds that the parties to a contract intended that result, and that the district court found that to be the case here. WCL relies on two statements in the district court's decision. One is at slip op. at 16-17 (emphasis in original):

> WCL seeks to apply BOC[T]'s tariff rates on file with the ICC. This outcome, however, has already occurred. The Interchange Agreement provided that BOC[T]'s 'standard intermediate switch' charges applied – i.e., BOC[T]'s filed tariff rates. The Interchange Agreement and BOC[T]'s filed tariff were compatible arrangements – the Interchange Agreement 'wrapped around' BOC[T]'s filed tariff rate. Enforcing BOC[T]'s tariff rates would result in the same judgment against WCL as contained in the Award, because once the Panel found liability under the Interchange Agreement, it applied BOC[T]'s tariff rates in calculating the damages owed BOC[T].

[2] WCL also judicially appealed the district court decision. The court of appeals affirmed the district court's decision, including its referral of the unreasonableness and discrimination claims to the Board. Baltimore & O. C.T. R.R. v. Wisconsin Cent. Ltd., 154 F.3d 404 (7th Cir. 1998), reh'g denied (Oct. 21, 1998), cert. denied, 526 U.S. 1019 (1999). WCL transferred funds in satisfaction of the award ($22.6 million, including interest) on March 31, 1999. WCL then asked us to proceed with its unreasonableness and rate discrimination claims.

The other statement is note 10, which reads:

> Although WCL may not maintain an action that seeks enforcement of the filed rate doctrine, WCL is not foreclosed from arguing that the damages under the Award emanate from BOC[T]'s tariff in order to advance WCL's ICC claims.

DISCUSSION AND CONCLUSIONS

As we read the court's referral, it simply acknowledges that, if WCL's unreasonableness and discrimination claims are to be adjudicated on the merits, it would be for the Board to do so. We do not, however, read the district court's decision as directing us to conduct such an inquiry if it would be inappropriate for us to do so, as it would be here.[3]

We have some regulatory authority over inter-carrier switching to assure that rail traffic is switched and movements completed.[4] But contracts between carriers governing the terms of such arrangements have been an accepted industry practice for interchange and intermediate switching, see, e.g., Birmingham Southern R.R. v. Director General, 61 I.C.C. 551, 555 (1921),[5] and there is a long, well-established policy of regulatory non-intervention into the terms of inter-carrier contracts. See, e.g., Delaware & Hudson R.R. Trackage Agreement Modification, 290 I.C.C. 103, 107 (1953) (citations omitted); accord, United States ex rel. Chicago G.W.R. Co. v. ICC, 71 F.2d 336, 340 (D.C. Cir. 1934), aff'd, 294 U.S. 50 (1935):

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[3] Nor did the Seventh Circuit, on review of the district court's decision, require us to reach the merits of WCL's regulatory challenges. Implicitly acknowledging that any unreasonableness and discrimination claims that WCL may have would fall within our primary jurisdiction, the Court simply affirmed the district court's referral of these issues. 154 F.3d at 406-07. It did not address how we should proceed or direct us to set aside legal and policy considerations that, as we describe herein, generally preclude us from providing regulatory remedies in such contractual matters.

[4] See 49 U.S.C. 11101 and 10742 (railroads, upon reasonable request, must provide service to transport a shipper's traffic from any origin to any destination and, if necessary to complete movements, accept traffic from other railroads and provide reasonable interchange facilities for the interchange of such traffic); see also 49 U.S.C. 10703 (railroads must establish reasonable through routes with other railroads); 49 U.S.C. 11103 (railroads must provide switch connections to the track of other railroads).

[5] Under former 49 CFR 1030.1, such agreements, pursuant to former 49 U.S.C. 10764(a)(2), did not have to be filed with the agency. Although that rule has been deleted, the same policy remains.

> Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences, and inequalities, . . . but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist.

Indeed, this policy long predates Congress' preclusion of our authority to review the terms of carrier-shipper contracts for rail transportation in former 49 U.S.C. 10713, now 49 U.S.C. 10709.[6] Thus, just as in the area of carrier-shipper contracts, the mere fact that WCL and BOCT chose to incorporate a tariff term into their contract does not give us authority or responsibility that we would not otherwise have to review the reasonableness of those terms. See H.B. Fuller Co. v. Southern Pacific Transportation Company, 2 S.T.B. 550, 553 (1997) (Fuller) (concerning a carrier-shipper contract):

> The contract, even though it may rely on the tariff for certain terms, reflects the bargain of the parties. The fact that the parties may have chosen to incorporate tariff terms into their contract does not make the transportation under the contract subject to regulation. Rather, the referenced tariff terms became contract terms for purposes of transportation performed under contract.

Accord, Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Company, STB Finance Docket No. 33582, slip op. at 3 (STB served Oct. 27, 1998) (Cross Oil) ("whether a common carrier tariff provision incorporated into a [carrier-shipper] contract has been violated, thus causing a breach of the contract, is a matter for the court, not the Board, to resolve, even where the dispute involves the construction of the incorporated tariff terms themselves).

In short, it is not our place to get involved in inter-carrier contractual arrangements absent some overriding public interest concern that requires our intervention and correction — i.e., one that would rise to the level of our statutory oversight responsibilities for inter-carrier arrangements

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[6] Section 10709 provides, in pertinent part:

> (c)(1) A contract . . . and transportation under such contract . . . shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.
>
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

(see footnote 4) — and nothing like that has been raised here. WCL relies on dicta in Coal Trading (involving a carrier-shipper rail transportation contract) for the proposition that a referenced tariff in a contract can be brought before us and challenged under the Interstate Commerce Act [now the ICCTA] if that was the intent of the parties. 6 I.C.C.2d at 365. But as WCL concedes, and as Coal Trading indicated, measuring contractual intent is a matter for the courts, id., and in the instant case we find nothing in the district court's language cited by WCL to indicate in any way the court's determination that such intent was contained in the parties' agreement.

In any event, to the extent that the ICC in dicta in Coal Trading suggested that parties to shipper/carrier rail service contracts could invoke our rate reasonableness authority notwithstanding the language in section 10709(c)(1) divesting us of authority to rule on the reasonableness of contract rates, that suggestion has little vitality in light of our later decisions in such cases as Fuller and Cross. Examining WCL's unreasonableness and discrimination claims here could lead to our re-examination of private agreements whenever one carrier party becomes dissatisfied with the outcome of its own bargaining, and this kind of regulatory intervention is inappropriate. Accordingly, WCL's requested relief will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition of WCL for a declaratory order and its request for a procedural schedule are denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary